Supreme Court, U.S.
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No. 991581

IN THE

Supreme Court of the United States

October Term, 2000

MORTADA HIZAM,

Petitioner,

vs.

HUSSEIN MOSSA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW.

Are racial and ethnic themes suggestive of collusion and fraud in a civil trial consistent with the mandates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS.

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
REPORTS OF OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISION	1
STATEMENT OF THE CASE	2
Procedural History	2
Statement of Facts	3
REASONS FOR GRANTING THE WRIT:	
Racial and Ethnic Themes are an Affront To the Court, to the Constitution and Mandate Reversal	5
CONCLUSION	7

APPENDIX:

Order of the Court of Appeals for the State of New York, Dismissing the Appeal, Dated January 6, 2000 ..... A1

Decision of the Court of Appeals for the State of New York, Dismissing the Appeal, Dated January 6, 2000 ..... A2

Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Entered October 1, 1999 ..... A3

Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Filed October 1, 1999..... A4

Judgment of the State of New York Supreme Court, County of Erie, Granted April 8, 1998 and Filed April 15, 1998 ..... A5

TABLE OF AUTHORITIES.

Page

CASES:

Abren v. Manhattan Plaza Asso., 124 AD2d 526, 625 NYS2d 234 (2nd Dept., 1995)..... 6

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986)..... 5

Clark v. New York City Transit Authority, 174 A.D.2d 580, 446 NYS2d 318 (1st Dept., 1982)..... 5

Graham v. Murphy, 135 AD2d 326, 526 NYS2d 414 (3rd Dept., 1988)..... 6

LeBlanc v. American Honda Motor Co., Inc., 141 N.H. 579, 688 A2d 556 (1997) 6

New York Cent. R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929) 5,6

Ostrowski v. Apex Marine Corp., 123 AD2d 257, 506 NYS2d 164 (1st Dep., 1986)..... 6

Pappas v. Middle Earth Condominium Asso., 963 F.2d 534 (Second Cir., 1992)..... 6

People v. Bolling, 79 NY2d 317, 582 NYS2d 950, 591 NE2d 1136 (1992) 5

Standard Fire Ins. Co. v. Reese, 584 S.W.2d 240 (1990)..... 6

Texas Employeers Ins. Ass'n v. Guerrero, 800 S.W.2d 859 (1990)..... 5,6

CONSTITUTION:

Amendment XIV..... 1,5

REPORTS OF OPINIONS BELOW.

Hizam v. Mossa, _____ NY2d _____, _____ NYS2d _____ (2000).

Hizam v. Mossa, _____ AD2d _____, 695 NYS2d 854 (4th Dept. 1999).

JURISDICTIONAL STATEMENT.

This Court has jurisdiction over this motion and the appeal pursuant to 28 U.S.C. §2101(e) in that the action originated in the New York Supreme Court, the Judgment appealed from dated and entered on April 3, 1998, has finally determined the action of Plaintiff, MORTADA HIZAM versus HUSSEIN MOSSA, Defendant; the Order is appealable as it directly involves the construction and application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The Appellate process in the State of New York has been exhausted as the Judgment was affirmed by the Appellate Division, Fourth Judicial Department on October 1, 1999 and the Notice of Appeal to the New York Court of Appeals dismissed on January 6, 2000.

CONSTITUTIONAL PROVISION.

This case involves the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

> "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Procedural History.

This is a negligence case involving an Arabic immigrant from Yemen, MORTADA HIZAM, who fell from a ladder on September 10, 1995. The property owner and individual who abandoned steadying the ladder was another Arab, the Defendant, HUSSEIN MOSSA. Suit was commenced by filing the Summons and Complaint on November 9, 1995. Discovery was completed and the case taken to trial and a jury verdict of "no cause" rendered on June 18, 1997. Following post-trial motions, which were denied by the trial court, the case was appealed in a timely manner to the Appellate Division, Fourth Department for the State of New York. The case was argued before the Appellate Division and a Decision and Order entered on October 1, 1999. These documents were served upon your deponent on October 5, 1999. Thereafter a Notice of Appeal to the New York Court of Appeals was filed on October 18, 1999. Notice of Appeal was dismissed for lack of a "substantial" Constitutional question on January 6, 2000.

STATEMENT OF FACTS.

Defense counsel made race and ethnic heritage the issue before an all white jury. This was the frequently repeated theme initiated in the openings and emphasized in the summation. In his opening statement defense counsel made sure the jury was fully informed as to the important racial issues in the case when he advised that "Any of you who know anything about the City of Lackawanna know that there is a large Arab community . . . they seem to take care of one another." "Mr. Hizam is trying to make a better life for himself in the United States than maybe he had in Yemen and I commend him for trying to learn the English language so that he can become a productive member of society over here."

Counsel then spoke briefly about the facts of the case where a stepladder fell sideways onto a driveway on September 10, 1995. The Plaintiff-Movant, MORTADA HIZAM sustained a severely fractured wrist. The fall from the ladder came about when the Defendant-Respondent, HUSSEIN MOSSA, who had been steadying the ladder walked away unannounced thereby rendering the ladder unsupported and unsteady. Though it is apparent from the names of the parties, counsel nevertheless spoke again about the parties "Arab heritage" and how those people "truly had a sense of community".

He talked about goals by mentioning that "Dreams are great. In jury selection we talked about it, some of your dreams." You must be careful however about "that motive part about having dreams." "I implore you . . . to . . . exclude any sympathy that you think engenders as a result of someone's dreams."

After establishing during the trial that the Plaintiff MORTADA HIZAM was in fact an Arab from Yemen, counsel began his summation by immediately

reintroducing and reinforcing the above racial themes. The jury was reminded of "the plaintiff's dreams," "that plaintiff had a life in Yemen" and that he had been a "teacher in Yemen." The suggestion, of course, is that he should have stayed in Yemen. "The plaintiff came to the United States for purposes of bettering his life."

The Jury was also reminded that "in the City of Lackawanna there is a large Arab community, and fairly cohesive." And they were told not to forget about "the plaintiff's dreams." And, in case the jury had missed it, they were told to remember "Mr. HIZAM, being a person from Yemen." And that this "person . . . would some day be applying for citizenship to this country."

Counsel continued with "what Mr. HIZAM is asking for is a million dollars . . . He has asked for one million dollars for his injuries . . . it certainly can't rest upon the dreams of MORTADA HIZAM and in making his life better here in the United States."

Finally then counsel reached and discussed briefly the merits of the case. However, the racial and ethnic themes and arguments were quickly returned to with "Plaintiff was a science teacher in his former country; . . . he is attenidng . . . the International Institute so that he can . . . learn the English language, become a productive member of society." The innuendo is that, obviously, he's not one of us, he is a foreigner, he cannot speak "our" language and certainly is not a productive member of our society. Had he simply stayed where he belonged, he had a job and could have supported himself and his relatives. We "talked about the dreams that this plaintiff had . . . the complaint in this action was filed less than two months later . . . you must look at what the plaintiff's motivation might be in this case. Is this a part of the plaintiff's dream to assimilate himself into the American populace?" "[O]nly you can make that decision."

REASONS WHY LEAVE TO APPEAL SHOULD BE GRANTED.

Racial and Ethnic Themes are an Affront To the Court, to the Constitution and Mandate Reversal.

The law of the United States of America and in the State of New York is that racial bias is not to be tolerated in any form or context. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed 69 (1986); *People vs. Bolling,* 79 N.Y.2d 317, 582 N.Y.S.2d 950, 591 N.E.2d 1136. *U.S. Constitution,* 14th Amendment. The above words and phrases from the defense attorney's opening and summation are neither fictional nor exaggerated. They are literal quotations from the trial. The arguments were suggestive of collusion and fraud by foreigners, "Arabs", who "take care of each other" and are not "productive members of society". They are, in effect, a burden on American society and implicitly the jury themselves. We all have to support them and their families while they try to learn English and maybe eventually find a job. "The quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think not open to argument." *New York Cent. R. Co. v. Johnson,* 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed 706 (1929).

"To permit the sophisticated ethnic plea while condemning those that are open and unabashed would simply reward counsel for ingenuity in packaging . . . lawyers have no right to undermine the ethnic harmony of society simply to win a lawsuit." *Texas Employeers Ins. Ass'n v. Guerrero,* 800 S.W2d 859 (1990). "The statements and their inferences were a conscious and deliberate effort to divert the jurors attention from the issues to be determined." *Clark vs. New York City Transit Authority,* 174 A.D.2d 580, 446 N.Y.S.2d 318 (1st Dept. 1982). "The public interest requires that the court on its own motion, as is its power and duty,

protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice." *New York Cent. R. Co. v. Johnson, supra; Graham v. Murphy,* 135 A.D.2d 326, 526 N.Y.S.2d 414 (3rd Dept. 1988); *Ostrowski vs. Apex Marine Corp.,* 123 A.D.2d 257, 506 N.Y.S.2d 164 (1st Dept. 1986); *Abren vs. Manhattan Plaza Asso.,* 124 A.D.2d 526, 625 N.Y.S.2d 234 (2nd Dept. 1995).

For example, in a case against Honda Motor Company, opposing counsel made two brief remarks about how their case was "not about Pearl Harbor or the Japanese prime minister . . . but about corporate greed." Just those two remarks in the form of a disclaimer were deemed "so prejudicial as to mandate reversal." *LeBlanc v. American Honda Motor Co., Inc.,* 141 N.H. 579, 688 A2d 556 (1997). Where comments are so prejudicial as to deprive a litigant of a fair trial, the verdict should be set aside. "Appeals to racial prejudice are one of the exceptional kinds of argument that are considered incurable." *Texas Employeers Ins. Ass'n v. Guerrero, supra, c.f. Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 240 (1990).

In a like manner, "no one suggests that appeals to ethnic prejudice should be treated differently from racial ones." *Texas Employeers Ins. Ass'n v. Guerrero, supra.* The appeals by counsel here were all of the above. They were a combination of pleas to racial, ethnic and regional biases. References to "Arabs" and "Yemen", "Arab heritage" and "Arab community" were "us-against-them" appeals. Such attempts create feelings of hostility against foreigner applicants, *Pappas v. Middle Earth Condominium Asso.,* 963 F.2d 534 (Second Cir., 1992) "Such remarks . . . tending to create an atmoshpere of hostility toward . . . another section of the country [or world] have been so often condemned . . . as to require no comment." *New York Cont. R. Co. v. Johnson, supra.*

CONCLUSION.

It is respectfully requested that this Court grant the petition for a writ of certiorari in this matter.

DATED: Buffalo, New York
March 25, 2000

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APPENDIX

Order of the New York State Court of Appeals, Dated January 6, 2000.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Sixth day of January 2000.

PRESENT, HON. JUDITH S. KAYE,
Chief Judge, presiding

Mo. No. 1504 SSD 78

MORTADA HIZAM,

Appellant,

v.

HUSSEIN MOSSA,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

Decision of the New York State Court of Appeals, Dated January 6, 2000.

STATE OF NEW YORK

(SEAL) COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

Mo. No. 1504 SSD 78

MORTADA HIZAM,

Appellant,

v.

HUSSEIN MOSSA,

Respondent.

DECISION January 6, 2000

Appeal dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

Order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Entered October 1, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1262

PRESENT: DENMAN, P. J., GREEN, HAYES, PIGOTT, JR., AND SCUDDER, JJ.

CA 99-56

MORTADA HIZAM,
Plaintiff-Appellant,

v.

HUSSEIN MOSSA,
Defendant-Respondent.

Mortada Hizam having appealed to this Court from the judgment of the Supreme Court, entered in the Erie County Clerk's Office on April 15, 1998, and said appeal having been argued by J. Michael Hayes of counsel for plaintiff-appellant, Robert E. Gallagher, Jr., of counsel for defendant-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed with costs.

Memorandum that is hereby made a part hereof.

Entered: October 1, 1999 CARL M. DARNALL, Clerk

Memorandum Decision of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Filed October 1, 1999.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(1262) CA 99-56. (Erie Co.) — MORTADA HIZAM, PLAINTIFF-APPELLANT, V. HUSSEIN MOSSA, DEFENDANT-RESPONDENT. — Judgment unanimously affirmed with costs. Memorandum: Plaintiff appeals from a judgment in favor of defendant in this negligence action. Plaintiff contends that the jury verdict is against the weight of the evidence and that defendant was negligent as a matter of law. We disagree. "Where varying inferences from the evidence are possible, the issue of negligence is left to the jury" (*Harris v Armstrong*, 97 AD2d 947, *affd* 64 NY2d 700, citing *Eddy v Syracuse Univ.*, 78 AD2d 989, 990, *lv denied* 52 NY2d 705). Here, defendant was holding a ladder for plaintiff but left his position temporarily to retrieve a tool. Plaintiff fell during defendant's absence. The jury was entitled to conclude that defendant was not negligent.

Plaintiff further contends that he was deprived of a fair trial because of improper statements made by defendant's attorney. The alleged improper statements were in fact innocent references to the ethnic heritage of the parties and, in any event, were fair response to statements regarding plaintiff's recent immigration made by plaintiff's attorney in his opening statement. (Appeal from Judgment of Supreme Court, Erie County, LaMendola, J. - Negligence.) PRESENT: DENMAN, P.J. GREEN, HAYES, PIGOTT, JR., AND SCUDDER, JJ. (Filed Oct. 1, 199.)

Judgment of the State of New York Supreme Court, County of Erie, Granted April 8, 1998 and Filed April 15, 1998.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

Index No. 95-8593

Filed in the Erie County Clerk's Office on:
FILED
APR 15, 1998
ERIE COUNTY
CLERK'S OFFICE

MORTADA HIZAM,

Plaintiff,

vs.

HUSSEIN MOSSA,

Defendant.

JUDGMENT

This action, having duly come on for trial before the Hon. Rose D. LaMendola, J.S.C., a Justice for this Court, and a jury, at a Trial Term of the Supreme Court held in and for the County of Erie at the Erie County Courthouse, Buffalo, New York, and the Plaintiff MORTADA HIZAM having appeared in person by his attorney, J. Michael Hayes and the Defendant, HUSSEIN MOSSA, having appeared in person by his attorney, Kenny, Kanaley, Shelton, Notaro, Liptak & Laing, Robert E. Gallagher, Jr., of Counsel, and the

issues having been duly tried and the jury having rendered a verdict on June 18, 1997 in favor of the Defendant, HUSSEIN MOSSA.

NOW, on motion of Kenny, Kanaley, Shelton, Notaro, Liptak & Laing, attorneys for the Defendant, it is

ORDERED, ADJUDGED AND DECREED that the Defendant, HUESSEIN MOSSA, of 167 Holland Avenue, Lackawanna, New York have judgment against the Plaintiff, MORTADA HIZAM of P.O. Box 1203, Buffalo, Lackawanna, New York for costs and disbursements as taxed in the sum of One Thousand Forty Dollars ($1,040.00), and have execution therefore.

Judgment signed and entered this 3rd day of April (~~March~~), 1998. R.D.L.

ROSE D. LaMENDOLA
Rose D. LaMendola
J.S.C.

GRANTED
APR 08 1998
BOB ADAMSKI
COURT CLERK

ENTER: